Supreme Court, U.S.
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91-1444

NO.

IN THE

Supreme Court of the United States

October Term, 1991

WILLIAM UTESCH, MICK DREA,
VICTOR C. TOMKA, CLARENCE VOS, *ET AL.*,
Petitioners,

v.

THOMAS H. DITTMER AND REFCO, INC.,
Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

APPENDIX TO THE PETITION

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TABLE OF CONTENTS

Page

Court of Appeals Opinion A-1

Court of Appeals Order Denying Rehearing . . . A-25

District Court Opinion A-27

Amended Judgment on Decision by the District Court A-49

Trial Transcript Excerpts A-51

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2735-NI
No. 90-2740-NI

William Utesch, a resident of the State of Iowa; Triple U Ranch, an Iowa limited partnership; Rod Amlie; Kenneth Becker; Marcel Becker; Leon Bruns; Merlyn Hegland; Floyd Jansma; Stanley Pankratz; Estate of Carl Pennings; Lee Stoll; Carl Winterboar; and Thane Wulf,	*	
and	*	
Clarence Vos, a resident of the State of Iowa; Idlewild Farms, Inc., an Iowa corporation; Vos Company, an Iowa limited partnership,	*	
and	*	Appeal from the United States States District Court for the Northern District of Iowa.
Victor C. Tomka, a resident of the State of Iowa;	*	

and

Mick Drea, a resident of the State of Iowa,

Plaintiffs-Appellees/ Cross-Appellants,

v.

Thomas H. Dittmer, a resident of the State of Illinois; and Refco, Inc., formerly known as Ray E. Friedman & Company, Inc., an Illinois corporation,

Defendants-Appellants/ Cross-Appellees.

Submitted: April 8, 1991

Filed: October 17, 1991

Before LAY, Chief Judge, FRIEDMAN,* Senior Circuit Judge, and John R. GIBSON, Circuit Judge.

FRIEDMAN, Senior Circuit Judge.

These are an appeal and a cross-appeal from a judgement of the United States District Court for the Northern District of Iowa (O'Brien, C.J.), entered on a jury verdict, awarding damages for violation of section 9(b) of the Commodities Exchange Act (Commodities Act), 7 U.S.C. § 13(b) (1976), section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 (1976), and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962 (1976). We reverse because the evidence is insufficient to support the jury verdict.

I.

A. This case grows out of 1979 transactions in the cattle futures market by the appellants Dittmer and Refco, Inc. It is the sixth appeal to us in damage suits growing out of those transactions.

The five previous appeals were suits brought against the appellants by brokers and customers of Refco for losses they allegedly sustained as a result of the appellants' transactions. In all of them, the appellants prevailed. See, Dudley v. Dittmer, 795 F.2d 669 (8th Cir. 1986) (reversing jury verdict in favor of Refco broker under antifraud provisions of Commodities Act, and remanding for new trial on market manipulation charge under that Act); Greenwood v. Dittmer, 776 F.2d 785 (8th Cir. 1985) (affirming j.n.o.v. in favor of defendants in suit by Refco customer under the Commodities Act); Horn v. Ray E. Friedman & Co., 776 F.2d 777 (8th Cir. 1985) (reversing jury verdict in favor of Refco broker in suit under Commodities Act and RICO); Bone v. Refco, Inc., 774 F.2d 235 (8th Cir. 1985) (vacating

*Daniel M. Friedman, of the Court of Appeals for the Federal Circuit, sitting by designation.

jury verdict in favor of Refco broker for breach of contract, and remanding for new trial); McIlroy v. Dittmer, 732 F.2d 98 (8th Cir. 1984) (affirming jury verdict in favor of defendants in suit by Refco customer under Commodities Act).

The plaintiffs in the instant case, however, were all cattle farmers who sold cattle in 1979. They claim damages on the theory that the appellants' transactions artificially reduced cattle prices in the Fall of 1979, thereby reducing the amount they received on the sale of their cattle.

B. A brief description of the "cash" and "futures" markets, in which cattle transactions take place, is necessary. The following discussion is based upon the testimony of the plaintiffs' expert, Professor Helmuth. See also the description of commodities markets in Judge Friendly's opinion for the court in Leist v. Simplot, 638 F.2d 283, 286-88 (2d Cir. 1980), and in the affirming opinion of the Supreme Court in Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 357-360 (1982).

There are two distinct markets in which cattle transactions take place: The "cash" market and the "futures" market. In the cash market, cattle are directly bought and sold. "Fat" or "live" cattle is cattle that is ready for slaughtering and processing. Feeder cattle are younger and lighter animals that will be fed and fattened to prepare them for slaughter.

A cattle futures contract is an agreement by which a person agrees to make or accept delivery of a stated amount of cattle in a designated future month at a specified price. A single "fat" or "live" cattle contract generally covers 40,000

lbs. of live cattle generally weighing 1050 lbs. each, so that each contract ordinarily covers 38-40 head of cattle. At the time of the transactions involved in this case, cattle futures contracts were traded on the Chicago Mercantile Exchange (Exchange).

One who sells a contract agrees to make delivery in a designated month, and one who buys a contract agrees to accept delivery. "Going short" is "synonymous with selling a contract" and "going long" is "synonymous with buying a contract."

Contracts are designated by the delivery month, e.g. an "October 1979 live cattle contract." The contract does not specify any particular date of the month in which delivery must be made, and the seller may select the delivery date.

Relatively few futures contracts result in actual deliveries of cattle. Normally, one who is long or short will offset his position by buying the same number of contracts of the opposite kind to equal his commitment. This is referred to as "liquidating a position."

People trade in the futures market either as speculation or as a "hedge." For example, farmers raising cattle for a future sale, whose profits depend upon the price they receive when such sale is made, may "hedge" against a low selling price by selling a futures contract for delivery at a stated price, and thus insuring themselves that price.

Regulations of the Exchange limit any one person to holding 450 speculative contracts for any particular month,

which must be reduced to 300 contracts when that month is reached.

C. In 1979, the appellant Dittmer was the president, chairman and sole stockholder of the appellant Ray E. Friedman & Co. (Refco). Refco was a commodities futures commission merchant which employed a number of brokers and executed trades on the Exchange for its customers. Dittmer had a trading account with Refco and engaged in extensive cattle feeding operations, both directly and through entities in which he had an interest.

In 1983, eight cattle-raising farmers filed five separate suits against Dittmer and Refco; in 1985, four of the suits were consolidated for discovery purposes; and in 1988 the court permitted 13 additional plaintiffs to join the suit, but refused to certify the suit as a class action. The plaintiffs then filed an amended complaint which alleged that between April and October 1979, Dittmer and Refco conducted an elaborate scheme to manipulate the prices of the October and December 1979 live cattle futures contracts in order to reap substantial trading profits and to reduce competition from small cattle producers.

The scheme, according to the plaintiffs, had three stages. First, Dittmer and Refco established long positions in the May 1979 feeder cattle contract and the June and August 1979 live cattle contracts, thereby acquiring the right to obtain a large number of cattle that would be ready for delivery in the October 1979 market. Second, in order to increase the price of the October futures contract, Dittmer urged Refco brokers and customers to take long positions in the October and December 1979 live cattle contracts by representing that there would be significant price increases in

the cash price of cattle for those months. Third, in the first week of October 1979, Dittmer and Refco closed out their long positions, took short positions, began to make massive deliveries of their cattle in the market, and tendered notices of intent to deliver even larger amounts of cattle.

The complaint asserted that this conduct of Dittmer and others operating in concert and conspiracy with him constituted (1) "a manipulation and corner of the cattle futures markets in violation of Section 9(b) of the Commodities Exchange Act, 7 U.S.C. §13(b) (1976)" (Count I), (2) "an unlawful combination and conspiracy in restraint of trade in the marketing of cattle in violation of Section 1 of the Sherman Act. 15 U.S.C. §1 (1976)" (Count II) and (3) the conduct of interstate enterprises "through a pattern of racketeering activity" in violation of RICO (Count III).

At the jury trial, each individual plaintiff testified to the price and quantity of the cattle he or she sold in the cash market during the relevant period. The plaintiffs introduced testimony that was given in one of the previous five cases against Dittmer and Refco, Horn v. Ray E. Friedman & Co., 776 F.2d 777 (8th Cir. 1985), which was read to the jury in question and answer form. The plaintiffs also presented testimony by two expert witnesses, which had not been presented in that earlier case, and Dittmer also testified.

The jury rendered a special verdict in favor of the plaintiffs on all three counts and awarded damages totalling $229,414.77, which the district court trebled under the Sherman Act and RICO counts. The court denied the defendant's motion for judgement notwithstanding the verdict or for a new trial. Utesch v. Dittmer, Nos. C 83-4154, C 83-4155, C 83-4156, C 83-4158 (N.D. Iowa Sep. 7, 1990).

D. Dittmer and Refco challenge the judgement against them on numerous grounds. They contend that the plaintiffs had no standing to maintain a private right of action under any of the three statutes upon which their complaint was based, that the evidence does not support the verdict, that the statute of limitations barred the claims of some of the plaintiffs, that some of the plaintiffs were improperly permitted to recover on claims belonging to partnerships and corporations, and that evidence was improperly admitted. The plaintiffs' cross-appeal challenges the district court's refusal to certify the suit as a class action and to award prejudgment interest.

We find it unnecessary to address most of these contentions, since we conclude that the evidence was insufficient to support the jury verdict on any of the counts and that the judgement in favor of the plaintiffs against the defendants, therefore, must be reversed. That conclusion makes the cross-appeal moot.

II. The Commodities Exchange Act Count.

At the time the events in this case arose, section 9(b) of the Commodities Exchange Act made it illegal

> for any person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any contract market, or to corner or attempt to corner any such commodity, or knowingly to deliver or cause to be delivered for transmission through the mails or in interstate commerce . . . false or misleading or knowingly inaccurate reports

> concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce . . .

7 U.S.C. § 13(b) (1976). A private suit may be maintained for violations of this provision. Merrill Lynch, Pierce, Fenner & Smith, Inc. & Curran, 456 U.S. 353 (1982).

The district court charged the jury that the plaintiffs could recover under their Commodities Act claim under alternative theories: (1) that the defendants "manipulated the price of October 1979 live cattle futures" or (2) that the defendants "knowingly delivered or caused to be delivered in interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning market information or conditions that affect the price of any commodity in interstate commerce."

The court further charged: to prove manipulation, the plaintiffs were required to prove that the defendants "created an artificial price for October 1979 live cattle futures," and that they "acted with the purpose or conscious object of causing or affecting a price or price trend in the market that did not reflect the legitimate forces of supply and demand influencing futures prices in the particular market at the time of the alleged manipulative activity." To prevail on the false information theory, the plaintiffs were required to prove that the defendants delivered false or misleading or knowingly inaccurate reports regarding the live cattle or live cattle futures markets, which "affected the price of October 1979 live cattle futures."

Under either theory it was necessary for the plaintiffs to prove that Dittmer's and Refco's actions were intended to and did produce an artificially low price for the October 1979 live cattle futures contract, and that these actions were a proximate cause of their damages. The evidence before the jury was not sufficient to support the jury's special verdict that the defendants "manipulate[d] the market for October 1979 live cattle futures."

A. The plaintiffs' claim that Dittmer and Refco created an artificially low price in the October 1979 futures contract had two elements: (1) That Dittmer's recommendations to Refco's brokers and customers from April to October 1979 -- that they go long in the futures market because he believed that futures prices would increase -- in fact was false and designed to increase artificially the price of October futures to enable him to unload his open futures contracts in that month at higher prices and that those recommendations had the effect of increasing the price for October futures contracts; and (2) that Dittmer's delivery of a large amount of cattle on October 2 and 3 artificially lowered the futures price and unduly depressed cattle prices, which continued to fall thereafter. The plaintiffs contend that Dittmer first unloaded his cattle at high prices and then depressed the price by going short on a substantial number of contracts, and that as a result, the plaintiffs received lower than normal prices when they subsequently sold their cattle.

To support this theory, the plaintiffs introduced the following evidence:

1. The testimony in the Horn case. The plaintiffs read into the record the testimony of several former Refco brokers, given in the Horn case, about statements made over

the "'Refco' hotline" -- a telephone line connecting Refco's headquarters in Chicago with its regional offices -- urging Refco brokers and customers to go long in the October and December 1979 live cattle futures contracts. The plaintiffs states that this testimony "established in detail the repeated exhortations on the Refco 'hotline' -- by Dittmer and other Refco personnel -- to get the firm's brokers and customers to 'go long in the cattle,' to 'load the boat,' and even to 'mortgage the farm.'" They assert these statements "were not even [Dittmer's] true opinion but worse, were part of a concerted effort to make false and misleading statements to affect the market price of live cattle futures," and that the defendants, "creating an artificial demand for the contract through these extraordinary and unfounded efforts to jack up the futures market price, created an artificial price for the contract."

In support of the latter contention, the plaintiffs' point to the testimony of two witnesses, Ed Apel (a floor trader on the Exchange) and Roger Johnson (a former Refco broker). Apel testified that in a conversation with Dittmer on October 2, 1979 regarding the October 1979 live cattle futures market, Dittmer stated that he favored the long position and that "it was news to me because up until the point of that phone call, he had always told me to get the heck out of my long cattle position." Johnson referred to a conversation he had with Dittmer in September 1979, in which Dittmer was "very aggressive in making the statement that he was going to drive the cattle market low." Johnson stated that he "was a little bit surprised because up to that point Refco had been very, very friendly or bullish to the cattle market and it seemed as though he had done an about turn and become quite bearish."

2. Trading activity in October 1979 by Dittmer and his affiliated entities. In the first three days of October 1979, Dittmer and Refco accounted for a significant portion of the total deliveries of cattle made under short positions in the October 1979 live cattle futures contract. On October 1, they made 55 percent (92 out of 166 deliveries); on October 2, 24 percent (103 out of 425); and on October 3, 57 percent (342 out of 602). For the remainder of the month, they made only three percent of total deliveries (23 out of 862). The total market deliveries in the first three days of the month (1193) constituted 58 percent of the total deliveries (2,055) for the entire month.

In his personal speculative account, Dittmer liquidated 300 long October futures contracts by purchasing 300 short contracts on October 2, 1979. Dittmer and his affiliates also liquidated several short positions in the October contract. The defendants allege in their brief that "most of the short positions (90 in No. 192 and 150 in No. 214)" in Dittmer's two personal hedge accounts "were closed by buying the market on October 2." The defendants further claim that the hedge accounts of ABF/Financial Co. and Cactus Growers, Inc. (Dittmer's cattle feeding companies) "held other short October live cattle positions" which were "closed by buying the market on October 2, 1979." The plaintiffs do not challenge these figures.

3. The Expert Testimony. The plaintiffs also presented, and rely upon, the testimony of two economic experts who had not testified in the Horn case; Professor Helmuth and Dr. Beyer.

Professor Helmuth described the operation of the cattle cash and futures markets and described a study he had

made for a congressional committee about cattle futures trading. He concluded in that study that once the price of futures contracts approached the cost of feeding the cattle, the prices would drop, and that "[e]vidence indicates that the predictable drops in live cattle futures prices are not reflective of fundamental supply/demand conditions and are, in fact, artificial price moves."

Dr. Beyer testified about trading in the October market. The plaintiffs retained Dr. Beyer to investigate two issues: (1) "whether or not the futures price for live cattle in October 1979 caused the cash price for live cattle in that same month to decline," and (2) if so, "the amount to which the decline in the cash price occurred because of the decline in the futures price."

Dr. Beyer testified that his investigation lead him to conclude (1) that "the review of information on the behavior of the futures market in October 1979, . . . provided to me a -- an indication that there was some unusual behavior occurring in the futures market in that month for live cattle futures'; (2) that "the statistical test that was performed resulted in a rigorous conclusion . . . that there was a causal relationship reflected in the statistical test between the futures prices and -- and the cash price"; and (3) that "the review of the supply and demand factors in and around October 1979 suggested on balance that the behavior of the cash price in 1979, October 1979 specifically, should have been relatively stable rather than declining as it actually did." Dr. Beyer's "fundamental" conclusion was that "there is a causal relationship between the futures price and its decline in October 1979 and decline in the cash price for live cattle in the same month."

Dr. Beyer did not examine or analyze Dittmer's trading activity in the October 1979 futures contract. In response to a hypothetical question based upon Dittmer's trading advice to Refco brokers and his trading activities on October 1 and 2 summarized above and "assum[ing] [his] actions became known to other major traders in the marketplace," Dr. Beyer states that "a given trader could influence, could cause the price for the futures in live cattle to change."

The plaintiffs' theory is that they were injured because Dittmer's and Refco's trading activities depressed cattle prices after October 2, 1979, when the plaintiffs sold their cattle in the cash market. Dittmer's recommendations to Refco brokers that they go long in the futures market could not themselves have produced that result, since the effort of those purchases would have been to increase rather than to decrease the prices of the October futures contract. The actions of Dittmer and Refco that allegedly were responsible for the decrease in cattle prices beginning in October 1979 must have been (1) their delivery of a large volume of cattle under short contract positions and (2) Dittmer's purchase of 300 short contracts on October 2.

There are no fixed standards or tests to apply in determining whether there has been "manipulation" of a commodities market. The Commodities Act does not define the term, and the "test of manipulation must largely be a practical one . . . . The aim must be therefore to discover whether conduct has been intentionally engaged in which has resulted in a price which does not reflect basic forces of supply and demand. . . ." Cargill, Inc. v. Hardin, 452 F.2d 1154, 1162 (8th Cir. 1971), cert. denied, 406 U.S. 932 (1972).

To establish manipulation that injured them, the plaintiffs were required to show that the post-October 2 prices in the October 1979 futures market were artificially low, i.e., lower than they would have been under the operation of normal supply and demand market forces, and that the decline in the futures price was a proximate cause of the decline in cash prices. The only theory upon which the earlier purchases by Refco brokers could have caused or contributed to that result would have been if the higher earlier prices on October futures caused a price drop beginning on October 2 that brought the futures price below what it would have been had there not been the prior purchases. As the plaintiffs stated at oral argument, the allegedly artificially-induced higher futures prices before October 1, produced a roller coaster downward effect on prices once they began to fall on October 2, and this brought prices below the level that otherwise would have prevailed.

There is no evidence in the record that would support a jury finding that Refco brokers' earlier purchases of the October futures contract would have had that effect, or that Dittmer knew they would do so. At most, the record would justify the conclusion that Dittmer's prior recommendations to go long increased the prices of the October contract and that the subsequent delivery of cattle and selling of October futures contracts on October 2 resulted in a decrease in prices.

Neither Johnson's testimony (given in the Horn case) that Dittmer told him in September 1979 that he (Dittmer) "was going to drive the cattle market low" or Dr. Beyer's opinion, given in response to a hypothetical question based on certain aspects of Dittmer's trading activities that may or may not have adequate record support, that such a trader

"could influence" or "could cause the price for the futures in the live cattle to change," are sufficient to bridge this causal gap. They do not establish that the trading activities of Dittmer and Refco had that effect.

Even if Dittmer and Refco had "the power and opportunity to do so," it they "did not in fact cause an artificial price [they] cannot be guilty of manipulation." Cargill, 452 F.2d at 1167. Here the plaintiffs have not shown either that Dittmer and Refco were responsible for the decline in cattle prices beginning in October 1979 or that October futures prices in that month were below the level that normal market forces would have produced. Dr. Beyer did not testify that prices were below that level. He stated only that there was "some unusual behavior occurring" in the cattle futures market in October 1979 and that market was "unusual." This is a far cry from stating that prices in the market in that month were below the prices that normal market forces would have produced, and would not warrant the jury in so inferring.

Likewise, Dittmer's purchase of 300 short contracts on October 2 could not support a finding that it had any effect on the futures price. On October 2, 15,250 trades were made in the October contract. Dittmer's purchase of 300 short contract was made to liquidate the long position in his speculative account, and represented less than two percent of the trading volume. Moreover, as noted above, Dittmer and his affiliates liquidated approximately the same number of short positions on that date. The effect of liquidating the short contracts presumably would be to support the October futures price, while the liquidation of the long contracts presumably would have the opposite effect on the price of

that contract. The net effect of this trading activity on the October futures prices, if any, would have been insignificant.

B. The district court charged the jury that to recover on their false information claim, the plaintiffs were required to show that the defendants knowingly delivered, or caused to be delivered, "false or misleading or knowingly inaccurate reports regarding the live cattle or live cattle futures market," and that these reports "affected the price of October 1979 live cattle futures." The plaintiffs assert that the Horn testimony made the showing.

Horn involved a claim under section 4b of the Commodities Act, 7 U.S. § 6b, that Dittmer had committed fraud in making certain statements. We reversed, holding that the evidence was insufficient to establish fraud.

One of the alleged fraudulent statements was that "Dittmer misrepresented to Apel on October 2, 1979 that he expected the price of October and December cattle futures contracts to rise and that he believed a long position in those contracts was correct." Horn, 776 F.2d at 780. We held:

> Dittmer's statement amounts to nothing more than the expression of his opinion concerning the cattle futures market. An expression of opinion may constitute fraud only if the actor knew when stating the opinion that it was false.
>
> There is nothing in the record of this case to indicate that Dittmer thought or knew that the statement was false when made. . . . In view

> of the volatile nature of commodities futures markets, Dittmer's opinion concerning the market could very easily have changed shortly thereafter. Moreover, commodity traders take positions in the market for a variety of reasons, and thus, at any given time, a trader's market position may not reflect his opinion concerning long-term market trends. . . .

Horn, 776 F.2d at 780-81 (citation omitted).

The flaws we found in the plaintiff's proof of fraud in Horn are equally present in the Horn testimony upon which the plaintiffs rely in the present case to establish that Dittmer and Refco made "false or misleading or knowingly inaccurate reports" regarding the October 1979 live cattle futures market. Although the plaintiffs correctly point out that Horn involved a claim of fraud under section 4b of the Commodities Act and the present case involves a charge of manipulation under section 9b of that Act, that distinction is irrelevant in determining the sufficiency of the evidence to show the giving of false, misleading, or knowingly inaccurate reports concerning the cattle market. The evidence upon which the plaintiffs rely is insufficient to show that Dittmer's investment recommendations and other statements he made regarding the October futures cattle market were false, misleading or inaccurate, or that he knew or believed them to be so when he made them.

III. The RICO Count.

Count III of the complaint alleged that Dittmer and Refco violated RICO, 18 U.S.C. § 1962(c), by engaging in

a "pattern of racketeering activity" through wire fraud, an "indictable" offense under 18 U.S.C. §§ 1341, 1343. According to the complaint, the defendants "used the mails and telephone" (1) to buy short positions in the October 1979 live cattle contracts under which large deliveries were later tendered at artificial prices; (2) to induce others, through fraudulent and deceptive statements and representations, to purchase large long positions in the October 1979 and December 1979 live cattle contracts; and (3) to communicate and conspire with their co-conspirators in furtherance of the alleged unlawful acts.

The evidence the plaintiffs relied on to support these charges was the same evidence they offered in support of their Commodities Exchange Act charge -- evidence which, they assert, "established that Dittmer's public expressions of opinion -- that the October 1979 live cattle futures market would go up -- were not what he actually believed." We have held, however, that evidence was insufficient to support their claims under the Commodities Act. The same deficiencies in that evidence that we have noted in part II of this opinion also undermine its sufficiency to support the jury verdict for the plaintiffs under their RICO count.

In Horn, the plaintiff made a RICO claim similar to that made here. In rejecting that claim, we stated:

> Because we have concluded that Horn did not make a submissible case of fraud against Dittmer, we likewise hold that there was insufficient evidence to send the RICO count to the jury. Not having been shown to have committed any fraudulent act, Dittmer could not have violated section 1343. Thus

> Dittmer's motion for a directed verdict or judgment n.o.v. on Horn's RICO claim should have been granted.

Horn, 776 F.2d at 782.

That reasoning is equally applicable to the RICO claims in the present case. The evidence does not support the jury verdict that Dittmer and Refco violation RICO, and that verdict cannot stand.

IV. The Antitrust Count.

Count II of the complaint alleged that the "plan and conspiracy of Dittmer and others acting in concert with him, to manipulate the live cattle futures market and to cause artificial cattle futures prices and cash prices . . . constitutes an unlawful combination and conspiracy in restraint of trade in the marketing of cattle in violation of Section 1 of the Sherman Act." In its instructions, the only reference the court made to the product market in the case was the statement that there was no controversy that "trading in live cattle futures" involves interstate commerce.

At oral argument, the plaintiffs stated that the gravamen of their antitrust claim was a conspiracy by the defendants to reduce the prices in the October 1979 cash market in order to injure the plaintiffs, who, as small cattle producers, were Dittmer's competitors. The theory of the antitrust claim thus is strikingly similar to that of the Commodities Act claim: That Dittmer and Refco conspired and combined to depress prices in the 1979 cash market by depressing prices in October 1979 futures market. Since the Sherman Act Count incorporated the allegations upon which

the Commodities Act count was based, the Sherman Act count apparently also reflects the theory that the defendants first attempted to increase the October 1979 futures contact prices, and then depress them, thereby reducing the Fall 1979 cash market prices.

The present case, therefore, is unlike the typical price-fixing case under Section 1 of the Sherman Act, where a group of competitors are alleged to have entered into a conspiracy or combination to eliminate or restrict price competition among themselves, either to increase or to stabilize their own profits or to injure another competitor. Here the theory is that Dittmer entered into a conspiracy with Refco and/or various individuals and companies to reduce prices in the October 1979 live cattle futures market by the first increasing prices before October in the futures market, with the intent thereby (1) to decrease prices in the October futures market and (2) to decrease prices in the cash market during the Fall of 1979. There is no basis in the record, however, upon which the jury properly could have concluded that Refco or any of the other named alleged co-conspirators entered into such a conspiracy with Dittmer.

To the extent that the plaintiffs rely on the Horn testimony that prior to October Dittmer was urging the Refco brokers to go long on October futures, the alleged conspiracy between Dittmer and the brokers would have been one to increase prices. Such a conspiracy would have helped rather than injured the plaintiffs, since they would have obtained higher rather than lower prices for any cattle they sold during the time of such agreement.

Moreover, there is no evidence that even suggests that, if the brokers had entered into such a conspiracy with

Dittmer, their ultimate aim was to lower rather than to increase prices in October futures market. Indeed, to the extent that the brokers and their customers went long in October futures, they did so in the hope that prices of those futures would go up, not down.

In addition to the Refco brokers, the complaint named as co-conspirators Apel, a floor trader on the Exchange, who occasionally executed trades for Dittmer, and also traded cattle futures for his own account through Refco; Cox, a large cattle feeder from Texas, who traded cattle futures for his own account through Refco; Block, who worked for Dittmer in a "bookkeeping numbers capacity" and managed the trading activity in the hedge account of DIT Trust, a Dittmer family trust that financed the purchase of cattle; and ABF/Financial Co., Cactus Feeders, Inc., and Cactus Growers, Inc., which were Dittmer's cattle feeding companies. The evidence would not support a jury finding that any of these alleged co-conspirators engaged in a conspiracy or combination with Dittmer to lower prices in the October 1979 cattle futures market.

The plaintiffs state that Apel, as a floor trader on the Exchange, "dealt closely with Dittmer" and handled his transactions. This is not evidence of a conspiracy between Dittmer and Apel to reduce cattle futures prices. This also is true of Horn's testimony that he believed Dittmer and Cox "were acting in concert" in early 1979 to take large deliveries of May 1979 feeder cattle and June 1979 live cattle, and that Strange and Bone (both former Refco brokers) had speculated that Dittmer and Cox were "partners in cattle feeding operations"; and Dittmer's testimony that he and Block "probably" discussed decisions over "whether to make a delivery" out of the DIT Trust hedge account. In

cases alleging conspiracies to fix or affect prices, "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case," and thus "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1985) (citing Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 764 (1984)).

The plaintiffs point to no evidence of any conspiracy between Dittmer and ABF/Financial Co., Cactus Feeders, Inc., or Cactus Growers, Inc. This is not surprising, since those companies were Dittmer's own cattle feeding companies.

The plaintiffs also rely on evidence that the Exchange imposed sanctions on Dittmer, Refco, and Refco brokers McVean, Bone, Strange, and Woods in December 1979. The Exchange's disciplinary actions arose out of several investigations it made of "serious and repeated violations of recordkeeping functions, order entry procedures, margin requirements, and hedge procedures which, if brought to hearing, may have been deemed violations of various Chicago Mercantile Exchange Rules." The persons against whom such proceedings were instituted settled the proceedings by consent agreements in which they did not admit any of the Exchange's allegations. In additions to the fact that there was no determination in those proceedings that any of the respondents, in fact, had committed the violations charged, there is nothing that suggests, let along demonstrates, that the alleged violations were the result of concerted rather than individual action.

In sum, the evidence simply does not support the jury's verdict that Dittmer and Refco engaged in a conspiracy or combination to lower the prices of the October 1979 futures contract, in violation of Section 1 of the Sherman Act. Much of the alleged conspiratorial conduct has not been shown to be anything more than normal legitimate trading activity, in which each market participant (e.g., commission merchants, customers, brokers, floor traders, etc.) acts independently and in its own best economic interests. "A jury cannot reasonably infer the existence of a conspiracy merely from the opportunity to form one." H.J., Inc. v. International Tel. & Tel. Corp., 867 F.2d 1531, 1545 (8th Cir. 1989). As previously noted, "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." Matsushita, 475 U.S. at 588 (citation omitted).

V.

In view of our conclusion that the evidence is insufficient to support the jury verdict in favor of the plaintiffs, the issues raised in the plaintiffs' cross-appeal -- whether the district court improperly refused to certify the suit as a class action and to award prejudgment interest -- are moot, and, therefore, we do not consider them.

The judgment of the district court is reversed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2735NISC

William Utesch, et al.,	*	
	*	
Appellees.	*	
	*	Order Denying Petition
v.	*	for Rehearing and
	*	Suggestion for Rehearing
Thomas H. Dittmer, et al.,	*	En Banc
	*	
Appellants.	*	

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Rehearing by the panel is also denied.

December 2, 1991

Order Entered at the Direction of the Court:

(signed) Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

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080790D1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

WILLIAM UTESCH, a resident of the State of Iowa, and TRIPLE U. RANCH, an Iowa limited partnership, et al., Plaintiffs, and	No. C 83-4154
CLARENCE VOS, a resident of the State of Iowa; IDLEWILD FARM, INC., an Iowa Corporation, and VOS COMPANY, an Iowa limited partnership, Plaintiffs, and	No. C 83-4155
VICTOR C. TOMKA, a resident of the State of Iowa, Plaintiff,	No. C 83-4156

and	)	
	)	
MICK DRA, a resident of the State of Iowa,	)	No. C 83-4158
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
THOMAS H. DITTMER, a resident of the State of Illinois; and REFCO, INC., f/k/a Ray E. Friedman & Company, an Illinois corporation,	)	
	)	
Defendants.	)	

ORDER

This matter is before the court after a jury trial on the merits and pursuant to several posttrial motions. The court has conducted two lengthy hearings on the pending motions and the parties have submitted several briefs on the issues. After careful consideration, the court makes the following rulings:

1) Defendants motion for judgment notwithstanding the verdict, or in the alternative, motion for new trail, is denied;

2) Plaintiffs' motion for class certification is denied;

3) Judgment shall be entered in favor of the plaintiffs and against defendants;

4) Plaintiffs motion for prejudgment interest is denied;

5) Plaintiffs shall be awarded postjudgment interest from the date of this judgment.

The court below sets out in further detail the grounds for its rulings above.

I. BACKGROUND AND FACTS

Plaintiffs brought this suit under the Commodity Exchange Act, the Sherman Antitrust Act, and the Racketeer Influenced and Corrupt Organization Act (RICO). The plaintiffs alleged that Dittmer, REFCO, and others conspired to manipulate prices in the October 1979 live cattle futures market. The defendants denied the allegations, and affirmatively claimed that the statute of limitations bars certain plaintiffs' claims. Plaintiffs sought to convert this case into a class action prior to trial, but the magistrate denied their motion. This court conducted a de novo review of the motion and, although allowing thirteen individual plaintiffs to join in the suit, affirmed the magistrate's denial of class certification. The matter thereafter proceeded to trial and a jury returned a verdict in favor of the plaintiffs on November 9, 1989, finding that:

1) Defendants Dittmer and REFCO manipulated the October 1979 live cattle futures market;

2) Defendants' manipulation of the market proximately caused plaintiffs' damages;

3) Defendants Dittmer and REFCO conspired to unreasonably restrain interstate trade;

4) Defendants' conspiracy proximately caused plaintiffs' damages;

5) Defendants Dittmer and REFCO directly or indirectly participated in the conduct of the affairs of an enterprise engaged in interstate commerce while the defendants were employed by or associated with the enterprise;

6) The defendants' acts proximately caused plaintiffs' damages;

7) Plaintiffs are entitled to damages totaling $229,414.77;

8) No plaintiff knew or should have known that he had a claim against defendants on April 25, 1981.

The court delayed entering judgment in this matter, upon plaintiffs' request and defendants' acquiescence, until after the court had an opportunity to hear the parties out and rule on their posttrial motions.

II. DISCUSSION

A. Defendants' Motion for Judgment Notwithstanding the Verdict, or in the Alternative, a New Trial.

Defendants submitted a 49-page brief asserting nine broad grounds which they assert entitle them to a new trial. Plaintiffs responded with a 52-page brief. While the court will not address each claim in the same detail, it will address them in the same order.

1. Artificial Prices under the Commodities Exchange Act.

Defendants assert, in relation to the claim of market manipulation under the Commodities Exchange Act, that the plaintiffs failed to prove intentional creation of artificial prices. Defendants argue that the court submitted Count 1 to the jury in such a manner that the jury could find market manipulation either through intentional creation of artificial prices, or by showing the intentional delivery of misleading or inaccurate reports. Defendants assert that there was insufficient evidence at the trial for a jury to find that the defendants engaged in activities that resulted in a change in the price, other than those created by normal economic activities. In sum, defendants assert that in order to manipulate the market to create artificial prices, defendants had to have a dominant market position in the 1979 market, and that they did not have that position.

Plaintiffs retort that they presented sufficient evidence for a reasonable jury to find that defendants created an artificial market place. Plaintiffs point out that the experts

for both sides testified that the October market conditions were unusual, and that the jury simply agreed with plaintiffs' expert that the defendants caused the abnormalities in the market. Plaintiffs also point out that the testimony of Mr. Johnson, the broker who worked with Mr. Dittmer, supports their evidence that defendants' distribution of false information was intended to manipulate the market. Plaintiffs also assert that market dominance is not a necessary element to the claim.

The court is persuaded that a reasonable jury could find defendants' actions caused artificial prices in the October 1979 live cattle futures market. A reasonable jury could infer that Defendant Dittmer's actions, in combination with those of others associated with or controlled by him, were intended to cause, and did cause, the creation of artificial prices in the 1979 market. Accordingly, defendants' motion for judgment notwithstanding the verdict or for new trial is hereby denied as to this ground.

2. Intent to Manipulate under the Commodities Exchange Act.

Defendants assert that plaintiffs failed to demonstrate that defendants intended, by their actions, to manipulate the market. The plaintiffs, however, claim that the evidence as a whole revealed an intent to manipulate the market. The court agrees; a reasonable jury could infer from the evidence at trial that the intent underlying defendants' position in the market at different times was to manipulate the market. This was at least a jury question based upon the evidence submitted at trial. For that reason, defendants' motion for judgment notwithstanding the verdict or new trial is denied as to this ground.

3. False Reports under the Commodities Exchange Act.

Defendants claim that plaintiffs failed to show that the defendants filed false reports. Defendants assert that any representations which Defendant Dittmer made were simply his opinions and that opinions cannot be false. The court disagrees that a jury must find that Dittmer filed false reports before finding that he violated the Commodities Exchange Act. Plaintiffs submitted sufficient evidence at trial for a reasonable jury to conclude that Defendant Dittmer's "opinions" carried the weight of recommendations, that other relied upon his recommendations to buy or sell commodities, and that Defendant Dittmer knew that others relied upon his recommendations in making their decision, and that he provided others with false information concerning market conditions in order to cause them to buy or sell commodities in such a way that he could personally benefit from their actions. Accordingly, defendants' motion for judgment notwithstanding the verdict or for new trial is hereby denied as to this ground.

4. Causality under the Commodities Exchange Act.

Defendants assert that plaintiffs failed to show that the October 1979 live cattle futures market was at an artificial level, or that the defendants caused the artificial level. This ground closely resembles the first, and the court's conclusion is the same. Sufficient evidence existed in the record as a whole for a reasonable jury to conclude that the October 1979 market was at an artificial level and that Defendant Dittmer's manipulation, in concert with others, caused the artificial prices. Accordingly, defendants' motion for

judgment notwithstanding the verdict or for new trial is hereby denied as to this ground.

5. Standing under the Commodities Exchange Act.

Defendants assert that plaintiffs lack standing under the Commodities Exchange Act because they claimed injury as buyers or sellers of cattle, not that they were traders in the commodities market. In short, defendants assert that the plaintiffs were not members of the class which Congress intended to protect in passing the Commodities Exchange Act. Plaintiffs, resist, asserting that the defendants did not timely raise the issue of standing in their motion for a directed verdict, nor in any answers or affirmative defenses filed in this action. Plaintiffs also assert that defendants' motion fails on its merits. Plaintiffs point out that Congress' policy declaration in section 3 of the Commodities Exchange Act, 7 U.S.C. § 5, would include that the Commodities Exchange Act was passed in favor of farmers, consumers, and processors as much as it was for the benefit of investors.

The court is persuaded that the Commodities Exchange Act included farmers and producers as a protected class under the Act. There is a strong interrelation between the commodity markets and the futures market; thus, producers are affected as much as investors by manipulation of the market. The court concludes, therefore, that the plaintiffs are beneficiaries of a judicially provided right of private action under the Commodities Exchange Act, section 9(b). Accordingly, defendants' motion for judgment notwithstanding the verdict, or in the alternative, motion for new trial, is hereby denied on this ground.

6. Antitrust Act Claim.

Defendants assert that plaintiffs failed to establish that defendants' actions had an uncompetitive effect. They further assert that plaintiffs failed to establish that defendants engaged in a conspiracy to restrain trade. Defendants also reassert their objection to this court's action in allowing the plaintiffs to amend their case and name a number of individuals as co-conspirators for the purposes of jury instructions. Finally, defendants argue that the plaintiffs failed to demonstrate that defendants' actions were a proximate cause of plaintiffs' damages.

The plaintiffs argue that they established a prima facie case of anticompetitive actions on the part of the defendants. This court agrees. The record contains sufficient evidence for a reasonable jury to conclude that the defendants' actions in affecting the market price of live cattle futures had an uncompetitive effect. The conspiracy was likewise established to a degree to at least make it a jury question. The plaintiffs established that defendant worked with others, both inside and outside of REFCO, in order to manipulate the market.

The court finds no merit to defendants' objections to the court's requirement of the plaintiffs that they name those who they believe were co-conspirators. First, it was well known by all the parties involved in this case with whom Mr. Dittmer worked and traded, and plaintiffs' allegations that the particular individuals named were at least potentially co-conspirators. None of the parties which plaintiffs named were unknown to the defendants, nor could it have been a surprise to any of the parties that the plaintiffs considered them at least partially involved and at fault and a part of the

conspiracy. Second, the court required the plaintiffs to name specific individuals, in part, because defendants objected that plaintiffs had failed to name anyone in particular. Finally, the court finds that the plaintiffs presented sufficient evidence for a reasonable jury to find that defendants' actions proximately caused plaintiffs' damages. Accordingly, the court hereby denies defendants' motion for judgment notwithstanding a verdict, or in the alternative, motion for new trial, on this ground.

7. RICO Claim.

Defendant REFCO asserts that plaintiffs cannot hold it liable under the RICO claim because of the Eighth Circuit's decision in Horn v. REFCO, 776 F.2d 777, 781-82 (8th Cir. 1985). The Horn court found that the trial court appropriately directed a verdict in favor of Dittmer on the ground that the plaintiffs in that case failed to establish that Dittmer committed any fraudulent act. Defendants further assert that the plaintiffs failed to demonstrate any pattern of racketeering activity, noting that the phone calls which the jury found culminated in the market manipulation only lasted over a two-month period. Defendants asset that the plaintiffs failed to show causality related to the injury. Finally, defendants assert that the court cannot hold REFCO liable for any acts Dittmer may have committed under some theory of respondeat superior.

Plaintiffs generally respond that, although the defendants cannot constitute an "enterprise" under RICO, an enterprise existed nonetheless between Dittmer, REFCO, and the Cactus Feeders because of their association. See Jacobson v. Cooper, 882 F.2d 717, 719-20 (2d. Cir. 1989). Plaintiffs further counter that the Horn decision does not bar

plaintiffs' RICO claim. In Horn, plaintiffs argue, the court concentrated on whether a conversation between Ed Apel and Dittmer was sufficient to establish a pattern of racketeering activity. Plaintiffs assert that, in the case at bar, plaintiffs submitted evidence of several months of misinformation and Commodities Exchange Commission rule violations which establish a continuing pattern of racketeering influence. Plaintiffs assert that they adequately proved that defendants' actions caused plaintiffs' damages. Finally, plaintiffs argue that REFCO's RICO liability derives from its own involvement in the market manipulation, and is not predicated upon Defendant Dittmer's actions. The plaintiffs submitted sufficient evidence at trial to demonstrate that Dittmer controlled and acted through REFCO, making respondeat superior unnecessary.

The court is persuaded that plaintiffs have submitted sufficient evidence at trial for a reasonable jury to conclude that defendants violated RICO. The court further finds that plaintiffs adequately established the necessary elements of proving the existence of an enterprise consisting of an association of the defendants, and that a pattern of racketeering activity consisted of the months of phone calls by which the defendants convinced brokers and clients to "go along" in the futures market. The court likewise finds that plaintiffs established a case sufficient for a reasonable jury to find that defendants' actions caused plaintiffs' injuries and that Defendant REFCO's actions constituted part of the conspiracy. Accordingly, the court hereby denies defendants' motion for judgment notwithstanding a verdict, or for a new trial, as to this ground.

8. Intervenor Plaintiffs' Claims.

Defendants next assert that the applicable statute of limitations bars the intervenor plaintiffs' claims. Although the plaintiffs recognize that the cause of action accrued in October of 1979, the plaintiffs have asserted that the doctrines of fraudulent concealment or equitable tolling apply to toll the running of the statute of limitations. The plaintiffs later abandoned fraudulent concealment as a claim after the court, in its July 3, 1989 order denying defendants' motion for summary judgment demonstrated skepticism as to applicability of this theory. The jury found that no plaintiff knew, or should have known, that they had a claim on April 25, 1981, thus adopting plaintiffs' theory of equitable tolling. The court is persuaded that the factual issue of plaintiffs' knowledge of their accrual of a cause of action was properly before the jury and that sufficient evidence existed in the record for a reasonable jury to find that the statute of limitations should be equitably tolled. Accordingly, the court hereby denies defendants' motion for judgment notwithstanding a verdict, or for a new trial, on this ground.

9. Standing.

Defendants assert that Plaintiffs Amlie, Pankratz, Wulf, Burns, and Stoll lack standing in this suit because they are not the parties in interest. In each of the cases, the plaintiffs were partners or stockholders of small partnerships or corporations which owned the cattle, the price of which the defendants' market manipulation affected. At trial, the defendants produced Exhibit 1004, which set out the specific amounts of claims which defendants contend belong to corporations or partnerships, and not to the named plaintiffs.

The plaintiffs assert that the claims were assigned to the named plaintiffs.

Defendants assert that they are greatly prejudiced if the court allows these plaintiffs' claims to remain. They assert that a major issue in this case is the equitable tolling of the statute of limitations, which they state may have been different had the defendants been able to question other stockholders or partners of these partnerships or corporations. Defendants assert that stockholders do not generally have standing to assert antitrust or RICO claims when the harm is derivative of harm to the corporation. Further, defendants assert that property of a partnership is considered belonging to the partnership as a whole and not to individual partners.

Plaintiffs counter that defendants' objection is that the named plaintiffs are not real parties in interest as defined under Federal Rule of Civil Procedure 17(a). Plaintiffs note that rule 17(a) seeks to protect defendants from further, unnecessary litigation and to make sure that the action has proper res judicata effect. Plaintiffs assert that the defendants have failed to demonstrate that the maintenance of this suit by the named plaintiffs frustrated either purpose under rule 17(a). Rule 17(a) also provides for ratification of suits by representatives of the partnership or corporation, which ratifications plaintiffs assert they have demonstrated.

The court is persuaded that it must deny defendants' motion for judgment notwithstanding the verdict, or for new trial, on this ground. The corporations and partnerships involved in this dispute are family farm corporations or partnerships where the named plaintiffs are generally the heads of the family involved. All the members of each

organization have had knowledge of its representatives' actions from the beginning. Several have ratified the actions prior to trial and plaintiffs submitted evidence in the form of testimony at trial showing ratification by others. Defendants have no basis for hypothesizing that any member of these family corporations would have had any greater knowledge of the accrual of the cause of action than those of the representatives. The court, therefore, finds that the corporations or partnerships have ratified the actions of the representatives in bringing this suit and that they are thus bound by the judgment in this case. Accordingly, the court hereby denies defendants' motion for judgment notwithstanding the verdict, or for a new trial, on this ground.

B. Plaintiffs' Motion for Class Certification.

Plaintiffs bring this motion as a motion for reconsideration of this court's denial of plaintiffs' motion for class certification. Plaintiffs correctly note that the court's primary concern in denying class certification prior to trial was that the individual factual disputes with regard to the tolling of the statute of limitations would predominate over the class-wide common issues of liability and measure of damages. Although the plaintiffs assert that the jury finding that the case was equitably tolled for the specific plaintiffs in this case somehow changes matters, the court is still persuaded that the factual disputes with regard to the running of the statute of limitations mandates that a class is not certified. The court is further persuaded that to certify a class at this point in the litigation would prejudice the defendants and would constitute an extension of the verdict to new plaintiffs, rather than an addition of new plaintiffs to the suit.

Plaintiffs assert that the jury's findings in this case that plaintiffs did not know, nor should have known, prior to April 25, 1981 that they had a cause of action, obviates that need for further factual findings with regard to the knowledge of the accrual of the cause of action. The court disagrees. Plaintiffs seek to certify a class constituting:

> All persons and entities (except defendants [and anyone associated with them]) who sold live cattle on the cash market in the United States during the period of October 2 through November 7, 1989.

The plaintiffs have earlier stated that this class could constitute thousands of new plaintiffs. Knowledge of a cause of action, or the reason to know of a cause of action, is an individual factual finding which would apply to each of the thousands of new proposed class members. The plaintiffs at the same time recognize this, yet try to bypass it, when they proposed to this court that it send out notices to potential class members which allow the potential class members to state when they knew that they had a cause of action. This cannot substitute for evidence sufficient to support a judgment. Such statements offer no opportunity for cross-examination. Plaintiffs rest upon the penalty for false claims to insure veracity, but such penalties do not substitute in our judicial system for cross-examination. Faced with this, plaintiffs suggest that the parties may then conduct limited discovery and submit the matter to a magistrate for individual findings. The court does not find plaintiffs' proposed solutions acceptable. This matter has already gone to trial. The defendants have persuaded this court that they would have changed their litigation strategies and tactics in the event that this matter had gone to trial as a class action rather

than by a number of individual plaintiffs. The individual factual findings involved in this action still predominate over any commonality in the potential class members' claims. The court hereby denies plaintiffs' motion to reconsider the denial of class certification.

C. Judgment.

At the plaintiffs' request, the court delayed entering judgment in this matter until after a ruling on the posttrial motions. The plaintiffs have filed a motion for the court to enter a judgment pursuant to which the court would retain jurisdiction of the class certification litigation, assuming the court granted plaintiffs' motions to reconsider in that regard. Because the court denied plaintiffs' motion to reconsider with regard to class certification, the court finds no need to enter any kind of exotic judgment at this time. Rather, the clerk of court is hereby ordered to enter judgment in this matter consistent with the jury verdict in this case.

D. Prejudgment Interest.

Plaintiffs have brought a motion for prejudgment interest with regard to Count 1 (Commodities Exchange Act) and Count 3 (RICO), to run from the accrual of the cause of action on November 7, 1979 to the return of the jury's verdict on November 9, 1990. Plaintiffs argue that the court should normally award prejudgment interest absent exceptional or unusual circumstances.

In determining whether to award prejudgment interest, the court must take into account four factors: (1) whether the amount of underlying liability was reasonably ascertainable at the time of the accrual of the action; (2) whether plaintiffs were deprived of the use of money for a

substantial period of time; (3) whether the plaintiffs were dilatory in bringing their claim; and (4) whether plaintiffs are guilty of any wrongdoing or bad faith. See Stroh Container Corp. v. Delphi Industries, Inc., 783 F.2d 743, 751-53 (8th Cir.), cert. denied, 476 U.S. 1141 (1986). The court finds that the last three factors above militate in favor of granting prejudgment interest for the plaintiffs, but that the first factor mandates that this court deny the motion for prejudgment interest. The court must consider what was reasonably ascertainable to the defendants at or near the time the cause of action accrued. See Behler v. Smith, 719 F.2d 950, 954 (8th Cir. 1983).

In the case at bar, the defendants could not have reasonably ascertained the amount of damages or injury which the jury awarded more than ten years after the injury occurred. The plaintiffs arrived at the amount of damages in this case only through the use of an expert. Several potential methods of calculating damages existed. Not until August of 1989 did the plaintiffs themselves have any calculation for individual damages. The plaintiffs' testimony revealed that they did not know what their damages were, but rather, were relying upon the figures at which their expert arrived. The calculations which the expert proffered, while accepted by the jury, were subject to many assumptions which the defendants attacked during cross-examination. The court simply finds that this is not the type of case in which the defendants should have to pay prejudgment interest; the amount of damages was not reasonably ascertainable at the time of the accrual of action. Accordingly, plaintiffs' motion for prejudgment interest is hereby denied.

E. Postjudgment Interest.

In a letter to this court dated April 27, 1990, plaintiffs acknowledge the case of Kaiser Aluminum and Chemical Corp. v. Bonjorno, 110 S.Ct. 1570, 58 U.S.L.W. 4421 (April 17, 1990), in which the Supreme Court ruled that postjudgment interest runs from the date the court enters judgment and not from the date the jury returns the verdict. Accordingly, the plaintiffs shall be entitled to postjudgment interest as of the date the clerk of court enters judgment in this case, consistent with the order of this court.

III. CONCLUSION

Upon the foregoing;

IT IS HEREBY ORDERED that defendants' motion for judgment notwithstanding the verdict, or in the alternative, motion for new trial, is hereby denied in its entirety.

IT IS FURTHER ORDERED that plaintiffs' motion for class certification is denied.

IT IS FURTHER ORDERED that the clerk of court shall enter judgment in this case in favor of the plaintiffs and against the defendants as set out in the jury's verdict form.

IT IS FURTHER ORDERED that plaintiffs' motion for prejudgment interest is hereby denied.

IT IS FURTHER ORDERED that plaintiffs shall be awarded postjudgment interest from the date of this judgment.

September 7, 1990.

Donald E. O'Brien,
Chief Judge
UNITED STATES
DISTRICT COURT

JUDGMENT ON DECISION BY THE COURT

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

WILLIAM UTESCH, a resident of the State of Ia., et al.,	:	Civil Action Docket No.
	:	C83-4154
v.	:	C83-4155
	:	C83-4156
THOMAS H. DITTMER and REFCO, Inc., et al.	:	C83-4158 JUDGMENT

This action came on for trial before the court, United States District Judge Donald E. O'Brien presiding. The issues having been duly tried and a decision having been duly rendered, it is ordered and adjudged that the plaintiffs' recover from the defendants, Thomas H. Dittmer and Refco, Inc. the sums listed below:

Plaintiff:	Amlie	$11,607.96
	K. Becker	$24,023.70
	M. Becker	$ 9,397.08
	Bruns	$10,854.26
	Drea	$ 3,507.04
	Hegland	$18,485.69
	Jansma	$ 7,910.91
	Pankratz	$ 8,667.53
	Pennings	$37,633.51
	Stoll	$ 3,819.63
	Tomka	$ 4,562.91
	Utesch/Triple U Ranch	$ 8,454.15

Idlewild Farms, Inc. , Vos Co./ Vos	$21,793.61
Winterboer	$10,962.03
Wulf	$47,734.76

together with post judgment interest from the entry of judgment and costs of this action.

Dated at: Sioux City, Iowa Date: September 7, 1990
William J. Kanak, Clerk

BY: (signed) M. Hock
Deputy Clerk of the Court

ORDER of September 7, 1990 & Jury Verdict of No. 9, 1989 attached.

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JUDGMENT ON DECISION BY THE COURT

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

WILLIAM UTESCH, a resident of the State of Ia., et al.,	:	Civil Action
	:	Docket No.
	:	C83-4154
v.	:	C83-4155
	:	C83-4156
THOMAS H. DITTMER and REFCO, Inc., et al.	:	C83-4158
	:	AMENDED JUDGMENT

This action came on for trial before the court, United States District Judge Donald E. O'Brien presiding. The issues having been duly tried and a decision having been duly rendered, it is ordered and adjudged that the plaintiffs' recover from the defendants, Thomas H. Dittmer and Refco, Inc. three (3) times the amount set out in the jury's verdict form, to ,reflect the mandatory treble damages, the sums listed below:

Amlie	$34,823.88
K. Becker	$72,071.10
M. Becker	$28,191.24
Bruns	$32,562.78
Drea	$10,521.12
Hegland	$55,457.07
Jansma	$23,732.73
Pankratz	$26,002.59
Pennings	$112,900.53
Stoll	$11,458.89

Tomka	$13,688.73
Utesch/Triple U Ranch	$25,362.45
Idlewild Farms, Inc. , Vos Co./ Vos	$65,380.83
Winterboer	$32,886.09
Wulf	$143,204.28

together with post judgment interest from the entry of judgment and costs of this action.

Dated at: Sioux City, Iowa Date: September 18, 1990
William J. Kanak, Clerk

BY: (signed) M. Hock
Deputy Clerk of the Court

Trial Transcript Excerpts

Roger Johnson Testimony

1415:18-1416:2

Q. Okay. Did you have any other meetings in 1979 after the July 1979 meeting where the cattle futures were discussed by Mr. Dittmer or others with Refco with you?

A. Yes. There were several meetings. Again, I say some of these took place in Memphis and some took place in Chicago. I remember one meeting, and I think this was in fall, and when I say fall, I'm talking September of 1979, where my wife and myself were in Tom's office for the bulk of the trading session. And Tom was very aggressive in making the statement that he was going to drive the cattle market low.

1416:13-21

Q. In what context did this remark come up about driving the cattle market down?

A. I gathered from Tom's phone calls, which I was not attempting to overhear his phone conversations, because I was also occasionally on the phone within his office. But I was a little bit surprised because up to that point Refco had been very, very friendly or bullish to the cattle market and it seemed as though he had done an about turn and become quite bearish.

1423:25-1424:6

Q. Mr. Johnson, I believe you've testified about a meeting between you and Mr. Dittmer and your wife in his office in September of 1979, is that correct?

A. I believe it was in September of '79, yes.

Q. And in that conversation Mr. Dittmer told you that he was going to drive the cattle market down?

A. Yes.